MICHAEL J. AGUIRRE, City Attorney
CHRISTOPHER S. MORRIS, Assistant City Attorney
MARGARET G. JACOBO, Assistant City Attorney
DIANE SILVA-MARTINEZ, Head Deputy City Attorney
DAVID J. KARLIN, Head Deputy City Attorney
STATE BAR NO. 156178

Office of the City Attorney
1200 Third Avenue, Suite 700
San Diego, California 92101-4103
Telephone: (619) 533-5500

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. COUNTRYWIDE FINANCIAL CORPORATION, a Delaware corporation; BANK OF AMERICA, a Delaware corporation; ANGELO MOZILO, an individual; DAVID SAMBOL, an individual; STANFORD KURLAND, an individual; CARLOS GARCIA, an individual; DOES 1-200, and ROES 1-500, inclusive, Defendants.	Case No. 08 CV 1348 JLS (BLM) **PLAINTIFF'S NOTICE OF MOTION TO REMAND COMPLAINT TO STATE COURT** Judge: Hon. Janis L. Sammartino Courtroom: 6 Date: November 13, 2008 Time: 1:30 p.m. **NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT**

TO: DEFENDANTS AND THEIR ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that on November 13, 2008, at 1:30 p.m., Plaintiff PEOPLE OF THE STATE OF CALIFORNIA will request this Court remand this action to the Superior Court of California, County of San Diego, pursuant to 28 U.S.C. § 1447(c). The grounds for this motion are as follows:

(1) Federal question jurisdiction does not exist under 28 U.S.C. § 1331 as Plaintiff's well-pleaded complaint does not contain claims that will necessitate the adjudication of substantial, disputed questions of federal law.

(2) Plaintiff's complaint is expressly exempt from removal to federal court under 28 U.S.C. § 1452(a).

The motion will be based on this notice of motion, the memorandum of points and authorities served and filed herewith, and such evidence as may be presented at the hearing of the motion.

Dated: August 7, 2008

MICHAEL J. AGUIRRE, City Attorney

By *\/s/ David J. Karlin*
David J. Karlin
Head Deputy City Attorney

Attorneys for Plaintiff

MICHAEL J. AGUIRRE, City Attorney
CHRISTOPHER S. MORRIS, Assistant City Attorney
MARGARET G. JACOBO, Assistant City Attorney
DIANE SILVA-MARTINEZ, Head Deputy City Attorney
DAVID J. KARLIN, Head Deputy City Attorney
STATE BAR NO. 156178

Office of the City Attorney
1200 Third Avenue, Suite 700
San Diego, California 92101-4103
Telephone: (619) 533-5500

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. COUNTRYWIDE FINANCIAL CORPORATION, a Delaware corporation; BANK OF AMERICA, a Delaware corporation; ANGELO MOZILO, an individual; DAVID SAMBOL, an individual; STANFORD KURLAND, an individual; CARLOS GARCIA, an individual; DOES 1-200, and ROES 1-500, inclusive, Defendants.	Case No. 08 CV 1348 JLS (BLM) **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION TO REMAND** Judge: Hon. Janis L. Sammartino Courtroom: 6 Date: November 13, 2008 Time: 1:30 p.m. **NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT**

INTRODUCTION

Michael J. Aguirre, acting in his official capacity as City Attorney for the City of San Diego, brought this civil law enforcement action on behalf of the People of the State of California against Countrywide Financial Corporation, its former top executives, and Bank of America Corporation which acquired Countrywide Financial on July 1, 2008 (collectively referred to herein after as "Countrywide" or "Defendants"). A complaint was filed in the Superior Court of the State of California for the County of San Diego on July 23, 2008, which alleges, *inter alia*, that Countrywide engaged in a pattern of unlawful, fraudulent or unfair predatory lending practices directed at San Diego residential purchasers and homeowners since 2003.

Specifically, the Complaint alleges one state-law cause of action for unfair competition in violation of California Business and Professions Code section 17200. The allegations against Countrywide, include, but are not limited to, one or more of the following unlawful, unfair or fraudulent business acts or practices: (a) by shifting its sales strategies away from traditional fixed-rate home loans to non-traditional, high-risk adjustable rate loans simply to increase company profits and its share of the national mortgage market (Compl. ¶¶ 4-5, 33-41); (b) by significantly deviating from traditional underwriting standards to the extent that loan decisions were no longer based on a borrower's ability to repay the loan (Compl. ¶¶ 43-49); (c) by creating an incentive based compensation system that induced brokers and sales associates to engage in predatory practices (Compl. ¶¶ 36, 56); and (d) utilizing deceptive lending practices to extend credit to borrowers who did not understand the terms or dangers of the loan agreements entered into (Comp. ¶¶ 52-53, 56-60, 64). The Complaint primarily seeks a permanent injunction to enjoin Countrywide from foreclosing on certain properties within the City of San Diego until Countrywide has met with the borrowers and taken reasonable steps to resolve their differences. Injunctive relief, civil penalties as well as other equitable relief are available to the City Attorney pursuant to California Business and Professions Code sections 17203 and 17206.

On July 25, 2008, Countrywide removed the City Attorney's state-law action to this Court on the basis of federal question jurisdiction pursuant to 28 U.S.C. § 1331 and, to a lesser extent, bankruptcy jurisdiction pursuant to 28 U.S.C. § 1334. In its Notice of Removal, Countrywide asserts that allegations in the Complaint "necessitate resolution of substantial, disputed questions of federal law, including but not limited to the Truth-in-Lending Act ("TILA"), 15 U.S.C. §§ 1601 et seq., and the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. §§ 2601 et seq." (Notice of Removal ¶ 8.) Although acknowledging that the allegations in the Complaint pled a "state-law claim," Countrywide erroneously states that the legal standards relevant to the City Attorney's unfair competition claim incorporate federal law such that the City Attorney will have to plead and prove Countrywide's conduct violated federal law in order to prove its case.

Countrywide also erroneously asserts that the City Attorney's action is not exempt from bankruptcy removal under 28 U.S.C. § 1452(a).

As set forth below, the City Attorney now moves to remand this matter back to state court pursuant to 28 U.S.C § 1447(c) as this Court lacks subject matter jurisdiction.

ARGUMENT

I. COUNTRYWIDE CANNOT OVERCOME THE STRONG PRESUMPTION AGAINST REMOVAL

As set forth in 28 U.S.C. § 1441(b), removal is permissible upon "[a]ny civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States." Whether a case is one arising under the Constitution or a law or treaty of the United States must be determined from what appears in the plaintiff's statement of his own claim, unaided by anything alleged in anticipation of defenses which defendant might interpose. *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 10 (1983); *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 475 (1998). Known as the "well-pleaded complaint rule," federal courts have "jurisdiction to hear, originally or by removal from a state court, ***only*** those cases in which a well-pleaded complaint established either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Board*, 463 U.S. at 27-28 (emphasis added). Remand is necessary if, from the face of the complaint, no federal question is presented and federal subject matter does not exist. *Id.* at 10.

Further, the principles of federalism, comity and respect for state processes demand that state court proceedings "be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately [the United States Supreme] Court." *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng's*, 398 U.S. 281, 287 (1970). These principles also guide the lower federal courts in determining the scope of removal jurisdiction under 28 U.S.C. § 1441(b). *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 810 (1986) (states that determinations concerning federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system.) The exercise of removal jurisdiction where, as here, federal law does not create the cause of action, raises "difficult issues of state and federal relationships [and] often yields unsatisfactory results." *Lippitt v. Raymond James Fin. Servs., Inc.*, 340 F.3d 1033, 1041 (9th Cir. 1992).

That is why, on a motion to remand to state court, a defendant bears the burden of demonstrating that a federal court would have had jurisdiction over a matter from the onset if filed originally in federal court. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). Stated another way, a defendant must demonstrate that its removal to federal court was proper. To meet this burden, a defendant must overcome a "strong presumption" against removal. *Id.* Courts "strictly construe the removal statute against removal jurisdiction [and] federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance." *Id.* A defendant must show that the complaint sets forth a federal right or immunity that is an "element and an essential one" of the plaintiff's cause of action. *Gully v. First National Bank*, 299 U.S. 109, 112 (1936); s*ee Franchise Tax Bd.*, 463 U.S. at 9-10, 12 (citing *Gully* and also noting that the threshold question for removal must focus on whether state law creates the cause of action, if so, federal question jurisdiction is unavailable unless there is some substantial disputed federal question that is a necessary element to one of the state law claims).

A. Complaint Contains Only A State-Law Cause of Action

Here, an examination of the City Attorney's Complaint reveals that it does not state a cause of action "arising under the Constitution, treaties or laws of the United States." *See* 28 U.S.C. § 1441(b). In fact, the Complaint makes no mention of TILA, RESPA, or any other federal statute. Rather, the Complaint simply sets forth one cause of action alleging a violation of California Business and Professions Code section 17200, which prohibits unfair competition manifest through unlawful, unfair or fraudulent business acts or practices. (Compl. ¶¶ 67-68.) Because section 17200 is written in the disjunctive, it establishes three varieties of unfair competition – acts or practices which are unlawful, unfair, or fraudulent. *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999). "In other words, a practice is prohibited as 'unfair' or 'deceptive' even if not 'unlawful' and vice versa."

Podolsky v. First Healthcare Corp., 50 Cal. App. 4th 632, 647 (1996). Each variety or prong has its own standard of proof separate and distinct from the others.

An unlawful business practice is anything that can properly be called a business practice and that at the same time is forbidden by law. *See Stop Youth Addiction v. Lucky Stores*, 17 Cal. 4th 553, 560 (1998). Under the unlawfulness prong, section 17200 "prohibits any practices, forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made." *Saunders v. Superior Court*, 27 Cal. App. 4th 832, 838-39 (1994).

An unfair business practice, on the other hand, may violate section 17200 even if it is not unlawful. California courts have announced a variety of different tests for determining whether a practice is "unfair." One is a balancing test used to find a practice unfair if it offends an established public policy, or is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. Unfairness is then determined by weighing the utility of the practice against the gravity of the harm to the consumer. *See Smith v. State Farm Mut. Auto. Ins. Co.*, 93 Cal. App. 4th 700, 719 (2001); *Klein v. Earth Elements, Inc.*, 59 Cal. App. 4th 965 (1997); *Motors, Inc. v. Times Mirror Co.*, 102 Cal. App. 3d 735 (1980). Another test adds to the above factors and looks to determine whether the practice is within at least the penumbra of some common-law, statutory, or other established concept of unfairness and whether it causes substantial injury to consumers. *See People v. Casa Blanca Convalescent Homes, Inc.*, 159 Cal. App. 3d 509, 530 (1984). Another test holds that the doctrine of unfairness must be "tethered to some legislatively declared policy or proof of some actual or threatened impact on competition," and that the conduct must be of the type "that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *See Cel-Tech Communications*, 20 Cal. 4th at 186-87. Finally, the last test looks to determine whether the injury to the consumer was substantial, whether the injury is outweighed by any countervailing benefits to consumers or competition, and whether the injury to consumer could not have been reasonably avoided. *See Camacho v. Auto. Club of Southern California*, 142 Cal. App. 4th 1394, 1403 (2006).

Lastly, a fraudulent business practice is determined by examining whether "members of the public are likely to be deceived," and unlike common law fraud, there need be no showing of actual deception, reliance or intent. *Committee on Children's Television v. General Foods Corp.*, 35 Cal. 3d 197, 211 (1983).

In its Notice of Removal, Countrywide takes creativite liberty when it interprets the City Attorney's Complaint as holding that "a plaintiff's right to relief under state law necessarily depends on the application or construction of federal law" when the alleged conduct is governed by TILA or RESPA. (Notice of Removal ¶ 14.) This position is both erroneous and misleading. First, a defendant, like this Court, must examine the "well-pleaded" complaint at face value. Under this rule, "the plaintiff is the 'master' of her case, and if she can maintain her claims on both state and federal grounds, she may ignore the federal question, assert only state claims, and defeat removal." *Duncan v. Stuetzle*, 76 F.3d 1480, 1485 (9th Cir. 1996). Secondly, Countrywide's position focuses exclusively on the "unlawfulness" prong of section 17200 and ignores the other two prongs. As set forth in detail above, a violation of section 17200 can be established in a variety of ways, most of which do not implicate "the Constitution, laws, or treaties of the United States" so as to give rise to federal-question jurisdiction. *See Lippitt*, 340 F.3d at 1043. As a result, no federal question is presented in the City Attorney's Complaint and remand is required to state court.

II. THE SECTION 17200 CLAIMS DO NOT IMPLICATE SIGNIFICANT FEDERAL ISSUES SO AS TO GIVE RISE TO FEDERAL-QUESTION JURISDICTION

In removing the instant matter to this Court, Countrywide states that this Court has original jurisdiction under 28 U.S.C. § 1331 because the City Attorney's Complaint "asserts claims that will necessitate the adjudication of substantial, disputed questions of federal law." (Notice of Removal ¶ 6.) This variety of federal "arising under" jurisdiction has been recognized for nearly 100 years where in certain ***limited*** cases federal-question jurisdiction has been found when state-law claims implicate significant federal issues. *Grable & Sons Metal Prods. Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005).

The United States Supreme Court in *Grable* stated the basic standard for removal on these grounds as follows:

> [T]he question is, does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.

Id. at 314. Stated another way, in order to prevail, a defendant must demonstrate that: (1) the state law claim raises a necessary federal issue; (2) that the federal issue is actually disputed and substantial; and (3) that assuming conditions 1 and 2 are met, that it is appropriate, from a state-federal balance of responsibility perspective, for the federal court to take this case away from the state court and hear it. It is not surprising that the Supreme Court has described the category of cases that meet this test as "slim." *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 701 (2006).

As stated above, the City Attorney's one-count complaint alleges that Countrywide engaged in unfair competition, as defined by state law, due to its unlawful, unfair or fraudulent lending practices. This count can be proven under a variety of theories and not solely under the unlawfulness prong as suggested by Countrywide. Allegations that touch upon TILA or RESPA simply provide a context for the substantive allegations of wrongdoing, and do not exclusively form the basis for any claim of relief. "When a claim can be supported by alternative and independent theories – one of which is a state law theory and one of which is a federal law theory – federal question jurisdiction does not attach because federal law is not a necessary element of the claim." *Rains v. Criterion Systems, Inc*., 80 F.3d 339, 346 (9th Cir. 1996). The implication of federal issues, if any, is neither essential nor substantial to the City Attorney's cause of action.

III. GOVERNMENT ENTITY EXEMPTION FROM BANKRUPTCY JURISDICTION

As an alternative basis for removal, Countrywide removed this action under 28 U.S.C. § 1452 stating that the Complaint "asserts claims that arise under or relate to a case under title 11 of the United States Code." (Notice of Removal ¶ 7.) Specifically, Countrywide claims that approximately 17,500 borrowers have sought relief in the United States Bankruptcy Court out of the 2.5 million subprime mortgage loans it has serviced in California since July 2004. (*Id.*) Without identifying any property currently subject to the City Attorney's Complaint, Countrywide states that "some or all of the claims asserted in the instant case are pre-petition assets that belong to the estates of bankrupt borrowers" and, as a result, bankruptcy removal is proper. (Notice of Removal ¶ 21.) Countrywide's premise is incorrect as 28 U.S.C. § 1452(a) expressly exempts "a civil action by a governmental unit to enforce such governmental unit's police or regulatory power" from bankruptcy removal. Additionally, the Ninth Circuit has specifically held that removal pursuant to 28 U.S.C. § 1452 does not apply to public law enforcement actions alleging violations of California Business and Professions Code section 17200.

In *City & County of San Francisco v. PG&E Corp.*, 433 F.3d 1115 (9th Cir. 2006), the California Attorney General and the City and County of San Francisco filed separate law enforcement actions against a bankrupt utility provider's parent corporation, alleging that the parent corporation had illegally transferred billions of dollars from the utility to itself in violation of California Business and Professions Code section 17200. *Id.* at 1118-19. The central question before the Ninth Circuit was "whether removal of the actions filed by the Attorney General and San Francisco was precluded because the clams were part of 'a civil action by a governmental unit to enforce such governmental unit's police and regulatory power;' and not subject to removal under 28 U.S.C. section 1452(a)." *Id.* at 1121. The court utilized two alternative tests to determine whether the actions of the Attorney General and San Francisco were in exercise of its police and regulatory power: the "pecuniary purpose" and the "public policy" test. *Id.* at 1123-24 (citing *In re Universal Life Church, Inc.*, 128 F.3d 1294, 1297 (9th Cir. 1997)). "Under the pecuniary purpose test, the court determines whether the government action relates primarily to the protection of the government's pecuniary interest in the debtor's property or to matters of safety and welfare." *Id.* at 1124-25 (quoting *Universal Life*, 128 F. 3d at 1297). The "public policy" test examines whether the government "seeks to effectuate public policy or to adjudicate private rights." *Id.* at 1125 (quotations omitted). The satisfaction of either test will suffice to exempt an action from bankruptcy removal. *Id.* at 1124. After analyzing the case, the Ninth Circuit held that the Business and Professions Code section 17200 lawsuits filed by the Attorney General and San Francisco constituted "police or regulatory power actions that cannot be removed to bankruptcy court under 28 U.S.C. section 1452(a)." *Id.* at 1127.

Here, an analysis of the City Attorney's 17200 action against Countrywide demonstrates that it too is exempt from removal under 28 U.S.C. § 1452(a). Like the Attorney General and San Francisco, the City Attorney is seeking injunctive relief, civil penalties as well as other equitable relief against Countrywide. Injunctive relief is universally viewed as falling within the police or regulatory exception for removal. *City & County of San Francisco*, 433 F.3d at 1124; *see also In re First Alliance Mortgage Co.*, 264 B.R. 634, 647 (C.D. Cal. 2001). Under the "pecuniary purpose" test, government action is barred "when the government acts solely to further a pecuniary interest alone, not when it seeks, through the imposition of fines or damages or even disgorgement, to punish wrongful conduct." *Id.* at 649. Seeking civil penalties, therefore, does not present a pecuniary interest for the City Attorney or his constituents. Similarly, restitution is not a pecuniary interest as it benefits "the public welfare by penalizing past unlawful conduct and deterring future wrongdoing." *City & County of San Francisco*, 433 F.3d at 1125. Additionally, there can be no serious debate that the City Attorney is effectuating public policy and not protecting private rights in this lawsuit against Countrywide. As explained by the California Supreme Court, a public entity lawsuit alleging violations of Business and Professions section 17200 is fundamentally a law enforcement action designed to protect the public and not to benefit private parties. *See People v. Pacific Land Research Co.*, 20 Cal. 3d 10, 19 (1977) (discussing the previous unfair competition statute found in former California Civil Code section 3363, a precursor to Business and Professions Code section 17200).

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

CONCLUSION

Based on the foregoing reasons, the People respectfully request the Court remand the case to state court pursuant to 28 U.S.C. § 1447(c) as the federal subject matter jurisdiction does not exist and this matter was improperly removed from state court.

Dated: August 7, 2008

MICHAEL J. AGUIRRE, City Attorney

By *___/s/ David J. Karlin________*
David J. Karlin
Head Deputy City Attorney

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA Plaintiff, v. COUNTRYWIDE FINANCIAL CORPORATION, ET AL. Defendants.	Case No.: 08 CV 1348 JLS (BLM) DECLARATION OF SERVICE

I, the undersigned, declare under penalty of perjury that I am over the age of eighteen years and not a party to this action; and that I served the individuals on the service list attached hereto the following documents: **NOTICE OF MOTION TO REMAND AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION TO REMAND,** in the following manner: (Check one)

1)___ By personally serving the individual named by personally delivering the copies to the offices of the addressee.

Time of delivery: ___________ a.m./p.m.

2)___ By leaving, during usual office hours, copies in the office of the person served with the person who apparently was in charge and thereafter mailing copies (first class mail, postage prepaid) to the person served at the place where the copies were left.

3) XX By electronic filing, I served each of the above referenced documents by E filing, in accordance with the rules governing the electronic filing of documents in the United States District Court for the Southern District of California, as to the following parties:

pmcnamara@omm.com

4) XX By placing a copy in a sealed envelope and placing it for collection and mailing with the United States Postal Service this same day, at my address shown above, following ordinary business practices to:

Brooks R. Brown
Goodwin Procter LLP
10250 Constellation Blvd., 21st Floor
Los Angeles, CA 90067

Thomas M. Hefferon
Goodwin Procter LLP
901 New York Avenue, NW
Washington, DC 20001

Executed: August 7, 2008, at San Diego, California.

[signature]
Marianne Troxell